United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7099, 7100

To be argued by
STEPHEN A. WEINER

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P/S

United States Court of Appeals

For the Second Circuit

REA EXPRESS, INC.,

Plaintiff-Appellant, Cross-Appellee,

against

INTERWAY CORPORATION and
INTEGRATED CONTAINER SERVICE, INC.,

Defendants-Appellees,

INTERWAY CORPORATION,

Defendant-Cross-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES AND FOR DEFENDANT-CROSS-APPELLANT

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BRIEF FOR DEFENDANTS-APPELLEES
AND FOR DEFENDANT-CROSS-APPELLANT

This brief is submitted by defendants-appellees Interway Corporation ("Interway") and its wholly owned subsidiary Integrated Container Service, Inc. in opposition to the appeal of plaintiff-appellant REA Express, Inc. ("REA") from a judgment of the United States District Court for the Southern District of New York (per Brieant, J.) entered on January 30, 1976 (121a-122a), and predicated upon findings and conclusions (77a-118a) reported at CCH Fed. Sec. L. Rep. ¶ 95,421. REA attacks the judgment only insofar as

it dismisses damage claims asserted under the principle of pendent jurisdiction, and based upon an alleged breach of contract by defendants. This brief is also submitted in support of Interway's cross-appeal from said judgment (124a-125a), challenging the lower court's failure to award pre-judgment interest to Interway for the period from November 1, 1968 to January 30, 1976 on a damage recovery of $127,472 permitted by said judgment with respect to Interway's counterclaim for breach of contract by REA.

STATEMENT OF ISSUES PRESENTED

1. Is an issuer liable for breach of an agreement with plaintiff to use its best efforts to register with the S.E.C. certain shares of its common stock to be received by plaintiff upon conversion of outstanding preferred stock, when:

(a) as a result of a pledge, plaintiff was not the owner of record of the preferred stock at the time it made the registration request, and only such owner could effectuate a conversion;

(b) in response to the issuer's position that the owner of record should consent to the request for registration and that the preferred stock should be converted, plaintiff agreed to furnish the issuer with the consent of such owner to registration and conversion, and attempted to obtain such consent in writing; and

(c) no such consent was ever furnished to the issuer?

2. On a claim for breach of warranties governed by New York law, was the injured party entitled to interest as a matter of right as part of a damage award?

STATEMENT OF THE CASE

A. Relevant Factual Background

On October 11, 1968 REA and Integrated Container Service, Inc. ("ICS"), a Pennsylvania corporation which was a predecessor of the defendants-appellees herein (41a-42a), entered into an agreement providing for the sale by REA to ICS of 51% of the outstanding stock of REA Leasing Corporation ("Realco"), then a wholly-owned subsidiary of REA, for the sum of $30,000,000. The parties also agreed that ICS would pay an additional $2,400,000, plus accrued interest, for subordinated notes of Realco held by REA. The agreement also contained certain warranties by REA as to the financial statements of Realco. (46a, 150a-160a)

In a separate agreement, also dated October 11, 1968, REA received an option from November 1, 1968 until July 11, 1969 to sell to defendant Interway (a company to be formed to hold the stock of Realco and ICS) any or all of the remaining 49% of the Realco stock for a total consideration of 440,000 shares (or a proportionate amount

thereof) of Interway preference stock. (46a, 249a-255a)* Such stock was convertible into Interway common stock on the basis of 1.5 shares of common stock for each share of preference stock. (46a)

The agreement of October 11, 1968 relating to REA's option contained the following provision as to registration rights:

> "ICS agrees that, at any time and from time to time following an acceptance by REA of all or any part of your additional offer or following the written notice of REA of intent to accept all or any part of such offer on or after the time the registration statement hereinafter referred to becomes effective, upon the written request of REA, ICS will, at its expense (including, without limitation, legal, accounting and printing costs, but excluding the cost of printing such number of copies of the preliminary and final prospectus as may be requested by REA for distribution by the underwriters), use its best efforts to register not less than the number of shares of ICS Common Stock (to be received by REA on conversion of the Preferred Stock) so requested to be registered under the Securities Act of 1933 (hereinafter called the 'Act'), and to keep such registration effective for a period of at least nine months; provided that in no event shall ICS be required to effect more than two registrations under this paragraph." (251a-252a)

The agreement also made reference (249a-250a) to

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* Interway was known by the name of Integrated Container Service Industries Corporation prior to May 1971. (41a)

REA's acceptance of an offer of ICS dated September 23, 1968 (135a-141a), which offer included the following provision:

> "Registration Rights: Upon 90 days notice by the holders of 30% or more of the Preference Stock, ICS Holding Company will convert such shares into Common Stock and will register an offering of such Common Stock, but not more than twice, at the Company's expense. At the request of any preference shareholder, ICS Holding Company will convert Preference Stock into Common Stock for inclusion in any registration statement it may file." (138a)

At a closing which took place on November 1, 1968 Interway, which had been incorporated in October 1968 and succeeded to the rights and obligations of ICS, purchased 51% of the stock of Realco and the subordinated notes of Realco held by REA for a total consideration of $32,411,000. (46a-47a, 78a)

On December 31, 1968 Interway filed a registration statement for a public offering of its shares of common stock. (48a) By letter dated January 15, 1969 REA elected to exercise its option with respect to 13% of the 49% of Realco stock still held by it, such exercise to be contingent on, and to become effective at the time of, the effectiveness of an underwriting agreement for the proposed public offering. REA requested Interway to use its best efforts (a) to register under the Securities Act of 1933 the 175,102 shares of Interway common stock to be received by REA on conversion of the 116,735 shares of convertible preference stock which would be obtained by such exercise of the option, and (b) to include such 175,102 shares in the proposed public offering,

of which Interway had previously informed REA. (48a, 269a-270a) In accordance with REA's request, such 175,102 shares of Interway common stock were sold in a public offering on March 6, 1969 pursuant to an Interway registration statement and prospectus of the same date. REA realized net proceeds of over $7,865,000 as a result of such sale. (48a)

By letter dated June 10, 1969, REA informed Interway that it elected to exercise its option with respect to 15% of the 36% of outstanding Realco stock then held by it. REA also requested Interway to use its best efforts to register the 202,041 shares of Interway common stock to be received by REA on conversion of the 135,694 shares of convertible preference stock to be obtained by such exercise of the option. (50a, 275a-276a)

By letter dated June 13, 1969, Interway informed REA that it would proceed, using its best efforts, to register the shares of common stock to be received by REA on conversion of the preference stock. At or about the same time, Interway suggested to REA that such registration was then undesirable for both Interway and REA. (50a, 278a)

On June 23, 1969, after negotiations, REA and Interway entered into an agreement pursuant to which Interway would acquire the remaining 36% of Realco stock still owned by REA, including the 15% referred to in REA's letter

of June 10, 1969. The agreement provided that Interway would pay REA approximately $4,714,000 for 20% of the Realco stock, and would acquire the remaining 16% in exchange for 143,673 shares of Interway convertible preference stock, in accordance with the option granted REA by the October 11, 1968 agreement. The agreement further provided that REA would not request a registration statement with respect to the shares of common stock into which the shares of preference stock were convertible prior to the earlier of December 1, 1969 or the date on which the bid price of the Interway common stock was $30 or more for ten consecutive trading days. Shortly thereafter, Interway proceeded to acquire the 36% of Realco stock for the specified consideration. (50a, 281a-282a)

B. Circumstances of the Alleged Breach

On June 14, 1971 REA requested Interway "to register 158,041 shares of common stock. (As converted on a 1 to 1.5 ratio of preferred stock)."* The letter also referred to a scheduled meeting between REA and Interway to discuss the matter. (54a, 283a)

At the time that REA made this request for registration, the 158,041 shares of convertible preference stock referred to in REA's letter were owned of record by Kugler

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* On November 1, 1969 and November 1, 1970 Interway had paid dividends totalling 14,368 shares of convertible preference stock on the 143,673 shares of such stock delivered pursuant to the June 23, 1969 agreement. (51a, 53a)

& Co. (79,020.5 shares) and Carr & Co. (79,020.5 shares), rather than by REA. (54a, 375a-388a) Accordingly, by letter dated July 1, 1971, Interway reminded REA that the shares were currently held in the names of Kugler & Co. and Carr & Co., and stated that "[t]he written consent of these holders to your request for registration of the common shares into which the preferred is convertible is necessary." (286a) Interway also stated that "[t]he [outstanding] convertible preferred must be converted into common shares before further efforts can proceed to register the common stock." (286a) This position was based upon the provisions of the letter agreement of October 11, 1968 between ICS and REA, pursuant to which the obligation to register related only to shares of common stock "to be received by REA on conversion of" the convertible preference stock. (252a; see also 281a-282a)

On July 28, 1971 Anderson & Allegaert, REA's duly authorized counsel (292a, 303a), wrote Interway as follows:

> "In response to your letter of July 1, 1971 we do not consider REA's demand for a registration of the shares of Interway Common Stock into which their shares of Interway Preference Stock are convertible to be in any way defective. While we do not feel it is necessary, we are in the course of obtaining the consent of the person for whom Kugler is a nominee to the registration and conversion of the 79,020 1/2 shares now standing in that name. Since the person previously having a beneficial interest in the 79,020 1/2 shares registered in the name of its nominee, Carr & Co., no longer has such interest, and the certificate for such shares has been delivered to REA duly endorsed and is presently held by REA, there will be no occasion for obtaining any consent from any other person as regards these shares." (288a-299a) (Emphasis added)

In response to such letter, Interway wrote Anderson & Allegaert on August 12, 1971:

> "We look forward to the receipt of the consent by the person for whom Kugler & Co. is nominee. We would also want to see the certificates issued in the name of Carr & Co. to satisfy ourselves that Carr & Co. no longer has any interest in the shares represented thereby and that they are now held by REA." (305a)

On or about July 26, 1971 Robert A. Burman, General Attorney and Assistant Secretary of REA, had addressed a letter to Deane G. Hope, Corporate Trust Officer of Morgan Guaranty Trust Company of New York ("Morgan"), referring to 79,020.5 shares of convertible preference stock of Interway comprising part of the trust estate under a specified indenture between REA and Morgan, and "currently standing in the name of the corporate trustee's nominee, Kugler & Co." (38a, 39a, 371a) The letter referred to REA's registration request of June 14, 1971 to Interway. It then stated:

> "Interway has demanded in reply that a consent be furnished on behalf of Kugler & Co. to (i) the registration for public offering of sufficient shares of Interway common stock for conversion thereto of the 79,020 1/2 shares of preference stock in the name of Kugler & Co., and (ii) the conversion of such preference stock to such common stock. Such consent should be given formally by Morgan Guaranty Trust Company and you individually as trustees. A form of consent is enclosed. Your readiness to execute it no doubt will depend on the desires of Equitable, the noteholder." (371a-372a)

The enclosed form of consent, drafted by Mr. Burman, stated:

> "...Morgan Guaranty Trust Company of New York as corporate trustee, and Deane G. Hope as successor individual trustee to Wesley G. Baker, under said Indenture as amended and supplemented, hereby consent to (i) the registration by Interway Corporation, formerly Integrated Container Service Industries Corporation, of so many shares of its common stock as will permit the conversion thereto of 79,020 1/2 shares of its convertible preference stock standing in the name of Kugler & Co., and (ii) the conversion of said shares of preference stock to said shares of registered common stock, or (iii) the conversion of said shares of preference stock to shares of common stock for sales exempt from the registration requirements of the Securities Act of 1933 as amended." (373a-374a)

The parties stipulated that on August 12, 1971 a Mr. McCurdy of Equitable Life Assurance Society of the United States ("Equitable") called Irvin G. Jenkins of REA:

> "to advise that they will not be able to provide ICSI stock [sic] for the unqualified approval to convert preferred stock to common at this time. However, they were in complete agreement that we [REA] should go forward with the registration effort and they would provide the approval coincident with the sale or registration of our stock. He indicated that the preferred stock has a $100 liquidated value whereas the common would have none and in view of our financial position they would wish to protect their interest." (126a, 307a)

The parties also stipulated that if Mr. Jenkins of REA were called as a witness, he would testify that he spoke with Messrs. Dennis J. Kenny and Alan I. Goldman of

Interway and relayed to them the position of Equitable, as set forth above. (127a) The parties further stipulated that, if Mr. Kenny were called as a witness, he would testify that in response to this message from Mr. Jenkins, he told Mr. Jenkins to get the consent of the registered holder of the stock in writing. (127a) As noted above, Kugler & Co., the nominee of Morgan, and not Equitable, was the registered holder of the 79,020.5 shares.

At no time did REA furnish Interway with the consent of the owners of record of the convertible preference stock to either a registration or a conversion. (103a) Nor did REA ever show Interway endorsed certificates in the name of Carr & Co., as requested by Interway.

Correspondence between Interway and REA on the registration issue subsequent to mid-August of 1971 related to REA's unsuccessful effort to obtain a "no-action" letter from the S.E.C., REA's contention that it had properly demanded registration and that Interway was in default in not proceeding, and Interway's reiteration of its position (366a) that REA "has not fulfilled the conditions precedent for a proper request to register. . . ." (312a-320a, 365a, 366a, 367a, 368a, 369a) REA made no further reference to the consent of the owners of record.

In February 1974 the convertible preference shares which were the basis of the request for registration were purchased from REA by Interway itself for a sum in excess of $2,700,000. (55a)*

C. The Proceedings Below

By its amended and supplemental complaint filed herein in May 1974, REA charged defendants, under the federal securities laws, with fraudulently inducing it to enter into the agreements for the sale of Realco. REA also asserted claims, on the basis of pendent jurisdiction, for alleged breach of the agreement to register. (3a-10a) Interway counterclaimed against REA, alleging breach of the warranties as to the Realco financial statements contained in the October 11, 1968 purchase agreement. (29a-36a)

After a non-jury trial Judge Brieant dismissed all claims asserted by REA, and awarded Interway damages of $127,472 on its counterclaim. (77a-118a)

REA's securities claim was dismissed on the ground that REA had not relied on certain misrepresentations found to have been made by defendants. (90a-98a) REA has not

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* Interway paid half the purchase price by a check payable to Morgan Guaranty Trust Company of New York and Deane G. Hope, Trustees (Jt. Exs. 261, 262).

appealed from this ruling.

As to the remaining REA claims, Judge Brieant held that Interway had not breached the agreement to register, because REA had never furnished it with the consent of the holders of record to the conversion of the convertible preference shares in question. (98a-103a) "In matters pertaining to important corporate actions such as a registration or a conversion of preferred stock into common . . ., a corporation is entitled to deal in all respects with its shareholders of record." (101a) As the court observed, under Interway's Certificate of Incorporation (262a-263a) only such holders were in a position to exercise the election to convert. Moreover, they might be unwilling to do so because of "the superior dividend, liquidation and redemption rights which the preferred enjoyed over the common." (102a) The court concluded that "it was implicit in the Letter Agreement [granting registration rights] that any request for conversion would be made (or at least consented to in writing) by the holder of record of the preferred shares. . . ." (102a-103a)

As for REA's statements to Interway concerning the position of Equitable, Judge Brieant noted that "it is obviously impractical to proceed with the difficult and expensive process of registering common stock (which is to be issued only upon the actual exercise of the conversion

privilege) upon the mere oral promise of the lender controlling the holder of record of the preferred that he will convert at the proper time. In any event, there is no evidence that Equitable had any direct communication with defendants on this subject." (118a)

In view of the conclusion which he reached, it was not necessary for Judge Brieant to consider other contentions of Interway as to lack of breach, or Interway's position that in any event its purchase of the shares from REA in 1974 for over $2,700,000 had eliminated any damage claim resulting from an alleged breach.

I

REA HAD NO RIGHT TO DEMAND A REGISTRATION WITHOUT FURNISHING THE CONSENT OF THE OWNERS OF RECORD TO REGISTRATION AND CONVERSION.

REA's initial contention is that it had a contractual right, acting alone, to demand a registration, even though others were the owners of record, because the agreement states that Interway will act at the request of REA. However, the agreement cannot reasonably be construed as requiring Interway to proceed regardless of the status of the convertible preference stock at the time of the registration request. REA's assertion would mean that even though it had parted with control of the stock, and

was in no position to effectuate a conversion into the common stock to be registered, Interway would have to go forward at REA's command, and would have no standing whatever to ascertain the position of the legal owners of the shares on registration and conversion. This is not a sensible conclusion as to what the parties intended.* If further clarification is needed, it is provided by Interway's offer (referred to and accepted by the agreement), which states that Interway will act on a registration request upon "notice by the holders" of the convertible preference stock. (138a, 249a-250a)

Judge Brieant was surely correct in concluding that only the owner of record, and not REA, was in a position to exercise the option of conversion,** and it was only the shares of common stock "to be received by REA" upon a conversion which Interway had the obligation to seek to register. (252a) (Emphasis added) Even assuming that REA should be deemed a potential recipient of shares of common stock, notwithstanding its relinquishment of record ownership, Interway surely was not obligated to proceed with the costly and time-consuming process of registration absent receipt of appropriate consents from the holders of record in support of REA's request. It was REA's

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* "Wherever . . . a contract cannot be carried out in the way in which it was obviously expected that it should be carried out without one party or the other performing some act not expressly promised by him, a promise to do that act must be implied." 11 Williston, Contracts § 1295 (3d ed. 1968)

** See 101a and authorities cited by the lower court. See also Gruss v. Curtis Publishing Co., CCH Fed. Sec. L. Rep. ¶ 95,524 (2d Cir. 1976). This point would not appear to be disputed by REA.

decision -- not Interway's -- to bestow legal title to the shares on other persons. When it did so, it "accepted the risks consequent thereon," including the risk that a request for registration coming from REA alone would be inadequate. Pierre J. LeLandais & Co. v. MDS-Atron, Inc., 387 F. Supp. 1310, 1317 (S.D.N.Y. 1974).

REA also errs in suggesting that the position taken by Interway in response to the June 14, 1971 registration request was inconsistent with the position it previously took with respect to two 1969 requests for registration by REA. The difference is that in both 1969 instances the convertible preference shares as to which conversion was demanded had not been issued as of the time of the demand. (269a-270a, 275a-276a) Rather, under the October 11, 1968 agreement certificates for such shares were to be delivered directly "to REA" at a future date when REA exchanged shares of Realco for shares of Interway, in accordance with the option which had been granted to it. (250a-251a) REA would thus have full control over the shares.

In contrast, when the 1971 request for registration was made, the convertible preference shares in question were already outstanding, having been issued almost two years before as a consequence of the June 23, 1969 agreement between Interway and REA. (281a-282a) Thus, in 1971 Interway was

in the position of knowing that REA was not the holder of record of outstanding shares which were the basis of the demand for registration, and REA's control over which (in terms of both registration and conversion) had not been established.

II

IN ANY EVENT REA WAS OBLIGATED TO FURNISH THE CONSENT IT AGREED TO PROVIDE, AND TO DISPLAY OR TRANSFER INTO ITS OWN NAME THE CERTIFICATES ENDORSED BY THE RECORD OWNER.

REA describes as "arbitrary" Interway's position as to the necessity of conversion of the preference shares before the registration effort could proceed. (App. Br. p. 15) It concedes "for the sake of argument that the Interway request for consent of the pledgee -- 'holder' -- was in itself a reasonable condition which REA was bound to comply with." (App. Br. p. 16)

In view of REA's status as one not the record owner at the time of the registration request, we submit that the position of immediate conversion taken by Interway was not unreasonable. After all, Interway's only obligation was to use its best efforts to register the common stock "to be received by REA" upon a conversion. (252a) Since REA was not the owner of record of the preference

stock, there was no basis for Interway's presuming that any such conversion would take place, or that REA would receive the common stock resulting therefrom. The most conclusive proof that REA in fact had sufficient control over the record holder to assure the existence of the common stock to be registered, and REA's rights therein, was for a conversion to be effectuated in conjunction with REA's registration request.

Moreover, the offer of Interway, referred to and accepted by the October 11, 1968 agreement (249a-250a), stated that upon "notice by the holders" of the convertible preference stock, Interway "will convert such shares into Common Stock and will register an offering of such Common Stock . . . . At the request of any preference shareholder, [Interway] will convert Preference Stock into Common Stock for inclusion in any registration statement it may file." (138a) (Emphasis added) This language clearly expresses the intent of the parties that conversion precede registration efforts.

However, in view of subsequent events it is not necessary to decide whether Interway was correct in asking for an immediate conversion in its July 1, 1971 letter. For REA itself, by letter from its counsel dated July 28, 1971, agreed to satisfy Interway's demands by obtaining "the consent of the person for whom Kugler is a nominee to the registration and conversion of the 79,020 1/2 shares now standing in that name." (289a) (Emphasis added) Significantly, when

Mr. Burman of REA wrote Morgan, i.e., "the person for whom Kugler is a nominee," he himself stated that "Interway has demanded in reply that a consent be furnished on behalf of Kugler & Co. to (i) the registration. . ., and (ii) the conversion. . . ." (371a) (Emphasis added)

Thus, the record is clear that: (1) REA agreed to comply with Interway's condition as to the furnishing of the consent of the holder of record to the registration, and (2) REA further agreed that, while an immediate conversion would not be forthcoming, it would furnish REA with a consent of the holder of record to an ultimate conversion. Even assuming that the condition of immediate conversion was "arbitrary", REA itself acknowledged that it was willing, in response to such demand, to give Interway some assurance that the holder of record was amenable to a conversion at an appropriate time. Indeed, as noted above, Mr. Burman of REA interpreted Interway's position as being a demand for a consent to a conversion.

REA never did what it itself agreed to do, as Interway was never furnished with a consent of a holder of record to either the registration or the conversion. Nor was Interway ever shown the "duly endorsed" certificates allegedly in REA's possession which were held of record by Carr & Co. REA also never made any effort to register such certificates in its own name.

Given REA's failure to meet its own commitments to Interway, we see no basis whatever for reversing the lower court's conclusion as to lack of breach.* Even assuming Interway had no right under the original agreement to seek anything from REA, notwithstanding its failure to qualify as the holder of record, REA agreed, in a communication to Interway signed by its counsel as agent, to obtain the consent of the holder of record to registration and conversion. Interway told REA it was looking forward to the receipt of this consent. Such an agreement represents a modification of the original contract (if one be deemed necessary) which under New York law is fully binding even assuming an absence of consideration. N.Y. General Obligations Law, § 5-1103. A letter from the contracting party or his agent will suffice as a binding modification. E.g., Thompson v. Willson, 183 Misc. 949, 950, 51 N.Y.S.2d 665, 666 (Sup. Ct. N.Y. Co. 1944), aff'd, 269 App. Div. 829, 56 N.Y.S.2d 415 (1st Dep't 1945).

As late as August 13, 1971 REA made an inadequate attempt to meet its commitments to Interway by orally conveying Equitable's position that the registration effort should go forward, and that Equitable "would provide the approval

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* "'The rule of law is that when the obligation of performance by one party to a contract presupposes the doing of another act by the other party prior thereto, there arises an implied obligation of the second party to do the act which the performance of the contract necessarily involves.'" 11 Williston, Contracts § 1295 (3d ed. 1968).

[for conversion] co-incident with the sale or registration of our stock." (127a, 307a) Since Morgan's nominee, and not Equitable, was the holder of record, this expression of Equitable's alleged wishes was deficient to serve as the consent of the registered owner. Moreover, as Judge Brieant correctly held (118a), Interway was entitled to more than an oral promise relayed by one other than the promisor. Interway properly told REA, in response to this message, that it should "get the consent of the registered holder of the stock in writing." (127a) Interway thus took the position in mid-August 1971 that REA should do what it itself had previously agreed to do.

We also do not understand REA's argument that Interway's initial insistence on immediate conversion prevented REA from satisfying its commitments as to the consent of the holders of record. REA had to do no more than furnish a document executed by the holder of record, and stating that it consented to a conversion of the preference stock, such consent to become effective, and the shares to be submitted for conversion, at such future time as the registration statement was made effective by the S.E.C. A similar formula was adopted by REA itself in January 1969, when it exercised its option to exchange Realco shares for Interway convertible preference shares, "such acceptance to be contingent on, and to become effective at the time of, the effectiveness of the Underwriting Agreement. . . ." (269a) REA repeated the formula in June 1969 when its exercise of the option as to the Realco shares was made "contingent on,

and to become effective at the time of, the commencement of the distribution of" the Interway shares to be received in exchange. (275a) Moreover, REA offers no excuse whatever for its failure to display to Interway, or to submit for transfer into its own name, the endorsed certificates in the name of Carr & Co.

Given all the foregoing circumstances, we fail to see the relevance of cases cited by REA for the proposition that "insistence on terms not in the contract constitutes an anticipatory repudiation of the contract." (App. Br. p. 16) Not only was Interway's position reasonable, in light of the record ownership of the shares*, but also REA expressly agreed to satisfy certain conditions after learning of Interway's position, and attempted, although inadequately, to do so.

Equally unavailing to REA is Marx & Co. v. The Diner's Club, Inc., 400 F. Supp. 581 (S.D.N.Y. 1975), upon which it heavily relies. In that case the party obligated to proceed with a registration did nothing for over two months, and belatedly raised questions about plaintiff's non-compliance with certain conditions. In contrast, Interway promptly specified certain conditions arising from the

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* An offer to perform made in accordance with a promisor's good faith interpretation of a contract, even if erroneous, does not constitute a repudiation, especially when further negotiations are contemplated or conducted. Walker v. Shasta Minerals & Chemical Co., 352 F.2d 634, 638 (10th Cir. 1965); see also Pacific Coast Engineering Co. v. Merritt-Chapman & Scott Corp., 411 F.2d 889 (9th Cir. 1969).

change in record ownership of the shares in question, and REA agreed to meet these conditions by taking specific steps. It is REA's own failure to perform, rather than Interway's alleged failure, which is determinative of REA's rights herein.*

III

THE LOWER COURT ERRED IN NOT INCLUDING INTEREST AS PART OF THE DAMAGE AWARD ON THE COUNTERCLAIM, AND INTERWAY'S CROSS-APPEAL ON THIS GROUND SHOULD BE SUSTAINED.

As already noted, Judge Brieant awarded Interway $127,472 on its counterclaim alleging breach by REA of certain warranties as to the financial statements of Realco contained in the October 11, 1968 purchase agreement. REA has not appealed this damage award against it. Interway has taken a cross-appeal on the ground that Judge Brieant erroneously refused to permit recovery of pre-judgment interest as part of the damage award.

In declining to award interest, Judge Brieant stated:

> "I decline as a matter of discretion to grant pre-judgment interest. Defendants waited almost three years to give notice of these claims, which in large measure appeared in the audit which was conducted immediately following the original transaction." (112a)

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* "[A] party to a contract who seeks to recover damages from the other party for the latter's breach must show that he himself is free from fault in respect of a condition precedent. . . ." Samuel Eiseman & Co. v. Fruchtman, 211 App. Div. 543, 548, 207 N.Y.S. 112, 117 (1st Dep't 1912).

It is Interway's position that it is entitled to interest as a matter of right, and that Judge Brieant erred in denying interest "as a matter of discretion".

As the counterclaim was predicated upon principles of pendent jurisdiction, and sought to enforce state-created rights with respect to a breach of contract, New York law is controlling on the recovery of interest. Julien J. Studley, Inc. v. Gulf Oil Corp., 425 F.2d 947 (2d Cir. 1969); see also United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966); Kristiansen v. John Mullins & Sons, Inc., 59 F.R.D. 99, 108 (E.D.N.Y. 1973); Mintz v. Allen, 254 F. Supp. 1012 (S.D.N.Y. 1966).

CPLR § 5001 provides in full as follows:

"Interest to verdict, report or decision

(a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

(b) Date from which computed. Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.

> (c) Specifying date; computing interest. The date from which interest is to be computed shall be specified in the verdict, report or decision. If a jury is discharged without specifying the date, the court upon motion shall fix the date, except that where the date is certain and not in dispute, the date may be fixed by the clerk of the court upon affidavit. The amount of interest shall be computed by the clerk of the court, to the date the verdict was rendered or the report or decision was made, and included in the total sum awarded."

That the New York statute is mandatory, and not discretionary, as to the award of interest in a breach of contract action is made clear by this Court's decision in Julien J. Studley, Inc. v. Gulf Oil Corp., supra. In Studley, the district court declined to award pre-verdict interest on damages awarded to a real estate broker for breach of contract. The district court reasoned that "considerations of fundamental fairness forbade the award of interest inasmuch as [defendant] had not had the use of the money to which [plaintiff] was entitled." (425 F.2d at 950) After noting the applicability of CPLR § 5001 to the action, this Court (per Friendly, J.) reversed, because "the New York statute provides interest as a matter of right in cases of this kind." (Ibid.)

In Spector v. Mermelstein, 485 F.2d 474, 481-83 (2d Cir. 1973), this Court reaffirmed its holding in Studley as to "the mandatory nature of § 5001(a) in a breach of contract action," and reversed the lower court for withholding interest as a matter of discretion because "much of the delay was attributable to [plaintiff] and [defendant] did not

have the use of the money." Similarly, in Menendez v. Saks & Co., 485 F.2d 1355, 1374 (2d Cir. 1973), this Court reiterated that § 5001(a) "does not allow any discretion on the part of the trial court in cases within its purview," and rejected an argument that an interest award was "inequitable."

These decisions are obviously controlling here. Accordingly, regardless of whether equitable factors would justify the withholding of interest, Judge Brieant did not have discretion to act on this basis. Rather, he was required to award interest "from the earliest ascertainable date the cause of action existed," i.e., from November 1, 1968, when the closing took place on the October 11, 1968 agreement.

CONCLUSION

The judgment appealed from should be affirmed insofar as it dismissed the amended and supplemental complaint. It should be modified so as to include pre-judgment interest from November 1, 1968 on the damage award on the counterclaim.

Dated: New York, New York
June 1, 1976

Respectfully submitted,

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

James C. McMahon, Jr., being duly sworn deposes and says that deponent is not a party to this proceeding, is over 18 years of age, employed by Winthrop, Stimson, Putnam & Roberts, attorneys for Defendants-Appellees

That on the 1st day of June, 1976, deponent served 2 copies of the within Brief for Defendants-Appellees and for Defendant-Cross-Appellant upon the person(s) listed below by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York:

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James C. McMahon, Jr.

Sworn to before me this
1st day of June, 1976.

Notary Public

JAMES D. WALSH
NOTARY PUBLIC, State of New York
No. 31-4142450
Qualified in New York County
Commission Expires March 30, 1978

COPY RECEIVED

This 1st day of June 1976

Whitman & Ransom

Attys. for REA Express, Inc.